

# Court of Appeal

FOURTH APPELLATE DISTRICT

Division One

750 B Street, Suite 300

San Diego, CA 92101

## **HANDOUT ON WRITS**

### **Preliminary Note**

This handout is intended to demystify the process for the practitioner and layperson who may be contemplating filing a petition for writ of mandate, writ of prohibition or writ of supersedeas. It does not address petitions for writ of review, petitions for writ of habeas corpus or other specialized writ petitions.

The court recognizes that writ petitions are frequently prepared in a hurry by counsel or parties with limited experience in writs. As a result, the court takes a relatively informal approach to writ procedure. For example, the court will treat your petition as having the proper label -- deem it to be a petition for writ of mandate if you mistakenly prayed for writ of habeas corpus -- and may call you if a critical part of the record is missing.

There are, however, certain requirements that are crucial to success in getting writ relief. This handout focuses on those requirements.

### **Prefiling Considerations**

The writ is simply a directive from this court to a lower tribunal to do something or stop doing something. Unlike appeals, which are heard as a matter of right, writ relief is deemed extraordinary, equitable and discretionary. Because of this, appellate courts generally grant writ relief only when the petitioner (1) has no other adequate remedy in the ordinary course of law and (2) will suffer irreparable injury if writ relief is not granted.

If the order you intend to challenge is directly appealable, you are considered to have an adequate remedy by law unless you can show special circumstances. Check Code of Civil Procedure section 904.1 to see what orders and judgments are directly appealable; for rulings not covered by that section, you may also wish to look at the cases dealing with the ruling in question to see if the issue was resolved by an appellate opinion or a writ opinion.

The irreparable injury requirement is more difficult to define. It is not established by the mere fact that you will have to spend time and money on an unnecessary trial if the ruling is wrong. Money damages are generally not considered irreparable injury. The threatened loss of one's home may be irreparable injury, although the threatened foreclosure of unimproved commercial property may not be. An ordered release of privileged information, disclosure of work product, or invasion of privacy interests will ordinarily qualify as irreparable injury. You need to judge the circumstances and the severity of the consequences to determine if you are a likely candidate for writ relief.

### **Types of Writs and** **Time Limits for** **Filing a Petition**

#### **1. Statutory Writs**

The Legislature has enacted statutes specifying that certain rulings may be reviewed by writ -- hence the term "statutory writ." (A non-exhaustive list of statutory writs is set forth in Attachment A to this handout.) Statutory writs are often required to be filed within the time frame prescribed by the statute itself, which is usually short -- 10 to 20 days. If you fail to comply with the statutory deadline, the appellate court will not have jurisdiction to grant your petition. If a statute authorizes review by writ but does not specify a time frame for filing the petition -- for example, a petition challenging an order awarding sanctions of \$5,000 or less (Code Civ. Proc., § 904.1, subd. (b)), or an order on a minor's emancipation (Fam. Code, § 7123)) -- the filing period is subject to general principles of laches described in the discussion of "Common Law Writs" below.

Just because the Legislature has authorized review by writ does not necessarily mean that you have to file a petition. In most cases, you may pass on the writ petition and still raise the issue on an appeal from the judgment in your case. Note, however, that there are a handful of rulings where your only avenue for review is by writ. Examples of these rulings include the *denial* of a motion to quash service of summons for lack of personal jurisdiction (Code Civ. Proc., § 418.10, subd. (c)), a ruling on the disqualification of a judge (Code Civ. Proc., § 170.3, subd. (d)), a ruling on the expungement of a notice of lis pendens (Code Civ. Proc., § 405.39), a decision in a Public Records Act case (Gov. Code, § 6259, subd. (c)), the revocation or suspension of a medical license (Bus. & Prof. Code, § 2337) and a good faith settlement determination (Code Civ. Proc., § 877.6, subd. (e)).<sup>1</sup> Judgments of contempt and decisions by the Workers Compensation Appeals Board and

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<sup>1</sup> It is unsettled whether the remedy by writ is exclusive for review of a good faith settlement ruling.

certain other administrative bodies are reviewable exclusively by writ and are not appealable, but review in these cases is by a petition for writ of certiorari or petition for writ of habeas corpus and is beyond the purview of this handout.

## 2. Common Law Writs

Writs other than those prescribed by statute are called "common law writs." There is no set time limit for filing a petition for common law writ relief. However, general principles of laches apply, and 60 days is the rule of thumb. In other words, you should file your petition within 60 days after the entry of the order you are contesting. If you file your petition after the 60 days have run, you must explain the reason for the delay and demonstrate the absence of any prejudice to the opposing party. Note that a petition may be denied as untimely even if it is filed within the 60-day period under certain circumstances (if, for example, the petition was not filed until the eve of trial and the challenged order was made some time before the trial date).

### **What You Must Submit**

If you decide to file a petition for writ relief, it is very important that you file all of the necessary components -- the petition, points and authorities, exhibits, a certificate of interested entities or persons, a certificate of word count and any applicable filing fee. (See Cal. Rules of Court, rules 8.485(a), 8.486 and 8.488 for details.)

#### 1. Petition

The petition must set forth the name and status of each party,<sup>2</sup> the action of the lower tribunal, the grounds for the petition, and the relief requested. You should include an explanation of how the tribunal erred, why relief by appeal is inadequate, and how the harm is irreparable. The petition should be verified by counsel as to the facts within his or her knowledge and by the petitioner as to the facts within petitioner's knowledge.

The color of the cover for all filings in a writ proceeding is red. You must file the original plus four copies of the writ petition and companion points and authorities. (Cal. Rules of Court, rule 8.44(b)(3).)

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<sup>2</sup> The parties to a writ proceeding are designated differently than they are in the underlying action. The party filing the petition is the "petitioner," the tribunal that issued the contested order is the "respondent," and the party that prevailed below is the "real party in interest."

## 2. Points and Authorities

Your points and authorities must set out the legal arguments in support of your petition. If time is extremely short, you can photocopy the points and authorities used in the lower court or incorporate your points and authorities by reference to an exhibit. However, the better practice is to redraft the points and authorities to address the reasons given by the lower court in its ruling.

## 3. Exhibits

Your petition should attach as exhibits all papers presented to the lower tribunal for consideration in ruling. This includes copies of the moving papers, the opposition, the reply, any other relevant pleadings (for example, the operative complaint), a transcript of the hearing and a copy of the contested order. Be sure to include a signed copy of the order -- or a minute order -- because it is the order that gives the appellate court jurisdiction. If you do not have a transcript, include a declaration explaining why the transcript is unavailable and fairly summarizing what transpired at the hearing or a declaration stating the transcript has been ordered and when it will be available.

You need to file only one set of exhibits if your exhibits are bound separately from your petition. If the exhibits are bound in the same volume as your petition, you must file the original and four copies. (Cal. Rules of Court, rules 8.486(c)(1)(A) and 8.44(b)(5).)

You must index-tab each document in your exhibits by number or letter, and consecutively number the pages of your exhibits from beginning to end. The court will allow you file to non-conforming exhibits but may strike or deny the petition unless, within five days, you supply the court with a corrected version of exhibits that has been properly tabbed and paginated or come to the Clerk's Office to add the tabs and number the pages. (Cal. Rules of Court, rules 8.486(c)(1) and (2).)

## 4. Certificate of Interested Entities or Persons

Parties to writ proceedings are required to file a certificate of interested entities or persons to give the court information to avoid conflicts of interest. If you are petitioning for writ relief, you must include your certificate in the petition. If you are responding to a petition, you must include your certificate in your first filing. If you do not file a certificate after the clerk notifies you that you must do so, the court may strike your filing. (See Cal. Rules of Court, rules 8.208 and 8.488 for the specifics).

## 5. Certificate of Word Count

Your petition must contain a certificate verifying the total number of words in the petition and points and authorities (excluding tables, verification and certificate). The maximum length permitted is 14,000 words including footnotes if the petition and points and authorities are produced by computer and 50 pages if they are typewritten. (Cal. Rules of Court, rules 8.486(a)(6) and 8.204(c).)

## 6. Filing Fee

You are required to pay a filing fee or complete an application for a waiver of fees at the time you submit your petition for filing.

## Stays

In connection with seeking writ relief, you may ask the Court of Appeal to stay (1) the enforcement of the challenged order or proceedings in the trial court while it is reviewing the writ petition or (2) the enforcement of a judgment until the appeal is resolved.

### 1. Temporary Stay

In general, if you need a stay while you pursue writ relief, you should first ask the trial court for the stay. If you are requesting a stay from this court, you must indicate whether you sought a stay below (and, if not, why not) and attach any relevant orders granting or denying the request. Be specific about the need for -- and timing of -- your request: state exactly what needs to be stayed and why, when the stay should go into effect, and whether the stay will prejudice any other party.

If you request a stay or other immediate action, you must place the words "STAY REQUESTED," "IMMEDIATE RELIEF REQUESTED" or words of similar effect prominently on the cover of your writ petition and identify the nature and date of the proceeding or act to be stayed. You must also identify the trial court and department involved, and name and telephone number of the trial judge whose order you want stayed. You are required to serve a petition that requests an immediate stay by personal delivery or by an expeditious method consented to in advance by the real party. If you do not comply with the service requirement, the court will not act on the request for five days except to deny it summarily unless you show good cause for your failure to comply. (See Cal. Rules of Court, rule 8.116 and Ct. App., Fourth Dist., Div. One, Local Rule 1(a) for specific requirements.)

The Court of Appeal may issue a stay without first soliciting or receiving a response. (Ct. App., Fourth Dist., Div. One, Local Rule 1(a).) Therefore, if you want to oppose a request for stay, call the Clerk's Office immediately and let the court know that you will be filing opposition.

## 2. Stay of Judgment Pending Appeal (Petition for Writ of Supersedeas)

The writ of supersedeas is in essence a stay or injunction issued by the appellate court to maintain the status quo pending appeal. To obtain a supersedeas, you should first show that you have tried unsuccessfully to obtain a stay from the trial court. (See, for example, Code Civ. Proc., §917.4 (undertaking to stay sale of real property)) and Code Civ. Proc., §917.7 (discretionary stay of order affecting child custody).) You must also show that you will raise a substantial issue on appeal, that you will suffer irreparable injury, and that the injury will be greater to you without the stay than to your opponent if the stay issues. (See generally Cal. Rules of Court, rule 8.112.)

You must specify on the cover of the petition for writ of supersedeas (1) the trial court and department involved and (2) the name and telephone number of the trial judge whose order the request seeks to stay. (See Cal. Rules of Court, rule 8.116(b).) Before filing the petition, you must file a notice of appeal and pay the filing fee on the appeal. There is no additional fee for filing the petition.

## **Responding to the Petition**

You do not have to do anything when you are served with a writ petition. This is because the Court of Appeal will not take any action other than issue a stay or summarily deny the petition without first affording you an opportunity to oppose the petition. (Ct. App., Fourth Dist., Div. One, Local Rule 1(b); Ct. App., Fourth Dist., Div. One, Internal Operating Practices & Proc., II(A), Original Proceedings (Writs); see also Cal. Rules of Court, rule 8.487(a)(4).) Unless the court orders otherwise, you will be required to pay a filing fee or complete an application for a waiver of fees at the time you submit your response to the petition.

The court will contact you if it wants you to respond and will notify the petitioner and all other parties that it has done so. If you need a short extension of time on the response, you may request one by calling the court. You should submit a written request for an extension greater than one week.

### **Disposition of the Writ Petition**

The Court of Appeal may summarily deny a petition with or without first obtaining a response. (Cal. Rules of Court, rule 8.487(a)(4); Ct. App., Fourth Dist., Div. One, Local Rule 1(b).) It will not grant writ relief, however, unless it has first provided the real party an opportunity to respond to the petition.

The court may grant writ relief by issuing what is called a peremptory writ in the first instance. A peremptory writ commands the party to whom it is directed to do, or desist doing, something. (Code Civ. Proc., § 1087.) If the court is considering issuing a peremptory writ in the first instance, it will provide notice to the parties and then decide the matter by opinion without hearing oral argument. Peremptory writ relief is relatively rare because it is limited to situations where (1) the petitioner's entitlement to relief is clear (for example, when the real party concedes the propriety of relief) and there has been clear error under well-settled principles of law and undisputed facts or (2) there is an unusual urgency to the issue that requires acceleration.

Except in those limited circumstances, the court will issue an order to show cause or alternative writ if it is considering granting writ relief. Issuance of the order to show cause or alternative writ converts the matter into a "cause" and requires the court to hear argument (if requested) and issue an opinion with reasons stated.

### **Review of Writ Decisions**

The Court of Appeal immediately loses jurisdiction once it issues an order summarily denying a writ petition and, therefore, has no power to entertain a petition for rehearing or reconsideration. If you want to challenge a summary denial, you must file a petition for review in the Supreme Court within 10 days of the date this court denies the petition. (Cal. Rules of Court, rules 8.490(b)(1)(A) and 8.500(e)(1).)

If, on the other hand, the appellate court issues an order to show cause, an alternative writ or a peremptory writ in the first instance, it prepares an opinion. In such cases, unless the court provides for early finality under California Rules of Court, rule 8.490(b)(2)(A), the time limits and procedures for review are the same as those governing regular appeals.

### **Tips**

1. The court typically handles 60 or so writ petitions a month and often under considerable time constraints. To improve your chances of success, help the court

understand why you need writ relief. Explain the background and issues in your case as clearly and succinctly as possible, and focus the argument. Make your exhibits user-friendly: include only relevant pleadings and organize them into manageable volumes (a couple of volumes of exhibits are preferable to one unwieldy volume).

2. Nothing is more frustrating to the court than an incomplete presentation. Make sure that your petition accurately reflects the proceedings, that you cite to the record, and that your exhibits contain the paperwork filed by both sides below.

3. The court discourages generic stay requests. Be particular in your request: explain exactly what you want stayed (the trial, a document production, a notice to vacate the premises, etc.) and when you need the stay.

4. Eleventh-hour stay requests rarely succeed. If you obtain an adverse ruling and require a stay so the matter can be reviewed, file your petition as early as you can.

5. If you intend to file a petition that requires action by the court that same day or the next day, call to advise the Clerk's Office that you will be filing the petition, when you anticipate filing it, and what you will be asking the court to do. If the urgency dissipates or you decide not to file the petition, let the court know.



## Attachment A

The following are examples of statutory writs:

### Civil Cases

Denial of motion to disqualify a judge (Code Civ. Proc., § 170.3, subd. (d))

Denial of a motion to quash service of process (Code Civ. Proc., § 418.10, subd. (c))

Summary adjudication of issues or denial of summary judgment (Code Civ. Proc., § 437c, subd. (m)(1))

Coordination petition (Code Civ. Proc., § 404.6)

Motion to expunge lis pendens (Code Civ. Proc., § 405.39)

Good faith settlement determination (Code Civ. Proc., § 877.6, subd. (e))

Motion for change of venue (Code Civ. Proc., §400)

### Criminal Cases

Denial of motion to disqualify a judge (Code Civ. Proc., § 170.3, subd. (d))

Denial of motion to set aside indictment or information (Pen. Code, §999a)

Denial of motion to suppress (Pen. Code, § 1538.5, subd. (i))